ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

October 4, 2002

Ex Parte Presentation

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in California*, WC Docket No. 02-306

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am attaching a copy of President Loretta M. Lynch's dissenting opinion to the Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order That It Has Substantially Satisfied the Requirements of the 14-Point Checklist in § 271 of the Telecommunications Act of 1996 and Denying That It Has Satisfied § 709.2 of the Public Utilities Code, *Rulemaking on the Commission's Own Motion to Govern Open Access*, D.02-09-050 (Cal. PUC Sept. 19, 2002). This dissenting opinion was released today.

I am also attaching, at the request of Commission staff, a file in Excel format that contains "statewide" performance results from May through August 2002 for performance measures 7, 8, 11, 12, and 16. Pursuant to the CPUC's requirements, these measurements are officially reported by Pacific on its website only on a disaggregated basis by region — North, Bay, Los Angeles, and South. See Affidavit of Gwen S. Johnson ¶ 46 & n.17, ¶¶ 197-198 (App. A, Tab 12).

In preparing this Excel file, SBC has identified and corrected some errors in the "statewide" results originally included in both Attachment C to the Johnson Affidavit (for May, June, and July 2002) and in the file called "PB_StateResults_ Aug02.xls" on the CD-ROM enclosed with the Ex Parte Letter of Geoffrey M. Klineberg to Marlene H. Dortch (Sept. 24, 2002) (for August 2002). In other words, the attached Excel file not only combines these two sources of data but also corrects

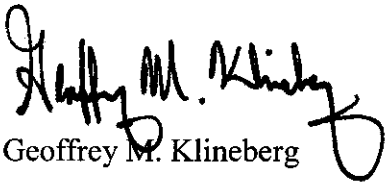
some errors reflected in the prior data. For ease of reference, the attached file designates, by marking in yellow, those cells containing corrected data.

The errors identified in the attached Excel file are minor and require no modification to the text of Gwen Johnson's affidavit or to any other part of SBC's application. Nor do these errors affect the reported performance results reflected in Attachments A and B to Gwen Johnson's affidavit. SBC compiled the "statewide" data manually for this Commission's use in its section 271 review. The manual errors in the original "statewide" data have now been corrected and did not affect the results produced through SBC's audited performance process. SBC has also taken steps to ensure that similar errors will not recur in providing this Commission with "statewide" results going forward.

In accordance with this Commission's Public Notice, DA 02-2333 (Sept. 20, 2002), SBC will file an original and two copies of the this letter and the attachments.

Thank you for your kind assistance in this matter.

Sincerely,



Geoffrey M. Klineberg

Attachments

cc: John P. Stanley (via electronic mail)
Renée R. Crittendon (via electronic mail)
Daniel R. Shiman (via electronic mail)
Tracey Wilson (via electronic mail)
Lauren Fishbein (via electronic mail)
Brianne Kucerik (via electronic mail)
Phyllis White (via electronic mail)
Qualex International

Attachment

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 4, 2002

TO: ALL PARTIES OF RECORD IN RULEMAKING 93-04-003 et al.

Decision 02-09-050 was mailed without the dissent of President Loretta M. Lynch. Attached herewith is the dissent.

Very truly yours,

/s/ CAROL A. BROWN (by ANG)
CAROL A. BROWN, Interim Chief
Administrative Law Judge

CAB/tcg

President Loretta M. Lynch, Dissenting:

I agree with the technical analysis of this decision and believe it presents the Commission with a thoughtful, articulate analysis of the record developed over the last four years. I remain concerned, however, that an affirmative vote on this decision is untenable under state law. Because I cannot agree with the decision in its entirety, I have reluctantly concluded that I must vote no.

To proceed with our recommendation to the FCC and to vote today, we must harmonize the requirements of state law with federal law. Section 271 of the 1996 federal Telecommunications Act (Telco Act) and Section 709.2 of the California Public Utilities Code both strive to ensure healthy local and long distance telecommunications markets by setting specific entry standards. The two sets of criteria present subtle but critical differences.

As the majority decision notes, Section 271 approaches the accessibility of the local exchange market by meeting the 14-point checklist. Federal law, as embodied in Section 271, also requires consideration of the public interest assessment of a Bell Operating Company's entry into the long distance market. By contrast, California Public Utilities Code Section 709.2, enacted in 1994, identifies criteria which the PUC must use to assess the public interest from the perspective of the health of the intrastate interLATA market.

The majority decision finds that, based on the exhaustive analysis of the assigned commissioner, ALJ and staff, Pacific Bell has met twelve of the

fourteen checklist items -- for about an 86% success rate. The decision also finds that Pacific Bell meets one of the four criteria set forth in Section 709.2, or 25%. One can debate for a long time whether the Commission's standard for endorsing Pacific Bell's 271 application should be 100% of the 271 and 709.2 criteria, or 86%, or something less. But by any measure, a 25% success rate for statutorily-mandated criteria is not a passing grade, and it presents this Commission with a difficult choice.

Ultimately, the Commission must decide whether a vote to endorse SBC Pacific Bell's 271 application at the Federal Communications Commission (FCC) is consistent with our legal obligation to uphold both state and federal law. California Public Utilities Code Section 709.2, enacted two years prior to the Telco Act, requires this Commission to determine that (1) competitors have fair, nondiscriminatory access to exchanges, (2) there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber contacts generated by its provision of local service, (3) there is no improper cross-subsidization of interexchange telecommunications service, and (4) there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.

These state law criteria do not precisely match the Telco Act's 271 requirements, but they both clearly contain the public interest criteria as a critical component. In Section 271 (d)(3)(c), the Telco Act anticipated that it would be critical for the FCC to consider not only the fourteen point checklist, but public interest criteria as well, by providing that the FCC *"shall not approve authorization requested in an application submitted...unless it*

finds that ...the requested authorization is consistent with the public interest, convenience, and necessity."

Our responsibilities as state public utility commissioners mandate that we follow and respect both state and federal law. That mandate requires us to try to harmonize statutes to be able to respect all laws. Certainly, the state Section 709.2 requirements provide a benchmark by which to evaluate the public interest of SBC Pacific Bell's 271 bid. The question is, do the federal 271 requirements pre-empt or supercede requirements imposed by state law? In my view, the ability of states to impose requirements is not inconsistent with federal law. Indeed, the ability of states to prescribe additional requirements is clearly articulated in the Telco Act.

Section 253 (b) of the Telco Act provides that "*nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.*"

In fact, the Telco Act also contains a Savings Clause in Section 601(c)(1), that puts to rest any doubt on this question: *"no implied effect - this act and the amendments made by this act shall not be construed to modify, impair, or supersede federal, state or local law unless expressly so provided in such act or amendments."*

Further, Section 261 (b) of the Telco Act States that *"nothing in this part shall be construed to prohibit any state commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such*

date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."

Finally, Section 261 (c) provides that *"nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with this part of the commission's regulations to implement this part."*

Thus, we need not decide whether federal law preempts state law – indeed, we cannot under the California Constitution[1] – because we have the ability and the obligation to harmonize the requirements of federal and state law. Put simply, according to the majority decision that reflects four years of analysis by the ALJ and staff, we can conclude at this time that Pacific Bell has met only the first requirement of state Public Utilities Code Section 709.2. The provisions of Section 709.2 are not pre-empted by, and indeed such state law provisions were anticipated by federal law. Any decision endorsing SBC Pacific Bell's 271 application to enter the intrastate long distance market without making the affirmative findings required by state law violates state law. As a body, and as individual commissioners, we are bound by our oath of office to act according to the laws of the state of California. This decision does not comport with the requirements of

[1] Article 3, Section 3.5 of the California Constitution, provides that "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:.... (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Section 709.2 because this decision does not contain the requisite affirmative findings as clearly articulated by state law.

Some of my colleagues have argued that this decision does not actually authorize or direct competition in intrastate interexchange telecommunications, as contemplated in Section 709.2; therefore, we need not feel bound to evaluate the Section 709.2 requirements in this decision. I respectfully disagree with this conclusion. The Telco Act requires the FCC to consult with the states in making its determination of a Regional Bell Operating Company's compliance with Section 271. Practically speaking, it is highly unlikely the FCC would move forward on Pacific Bell's application without a recommendation from this Commission.

If this Commission's action was either insignificant or unnecessary, why did we spend so many resources and so much time on this case over the past four years? If this vote on this decision does not constitute an action as contemplated by Section 271, what is it that we do here today? It strains more than credulity to define this decision and our vote today as an advisory opinion as distinct from an action; it strains the law and the process. By attempting to redefine the essence out of the fundamental way we fulfill our oaths of office – through our public votes on decisions crafted in our public proceedings – we undermine the respect for and the legal consequences of our decisions. If a vote on this decision does not constitute an action of this Commission, what is the legal or statutory support for the vote we take here today? Thus, the vote we take today falls within the definition of an action as contemplated by P.U.Code Section 709.2.

If the FCC ultimately approves Pacific Bell's long distance bid, little is left for this Commission to act upon with regard to whether Pacific Bell may offer intrastate intraLATA service. Apart from that threshold question, I believe the PUC has the authority and the ability to address *how* intrastate long distance could be provided in a way that satisfies Section 709.2.

The bottom line is that we cannot make the findings we are required to make under state law. Pacific Bell has made significant progress in opening its local networks and systems to competitive local exchange carriers. Unfortunately, the record we have in this case, despite the fact that it was four years in the making, simply does not allow us to make the remaining three findings required by state law at this time. I am therefore deeply troubled whether a yes vote on this decision is tenable under state law.

For that reason, after carefully evaluating the law and the facts, I have reluctantly concluded that I cannot find that it would be in the public interest to support the decision as a whole.

Dated September 19, 2002 in San Francisco, California.

/S/ LORETTA M. LYNCH
Loretta M. Lynch
President

DOCKET NO. 02-306

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

o This document is confidential (**NOT FOR PUBLIC INSPECTION**)

o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.

o Microfilm, microform, certain photographs or videotape.

● Other materials which, for one reason or another, could not be scanned into the ECFS system.

The actual document, page(s) or materials may be reviewed (**EXCLUDING CONFIDENTIAL DOCUMENTS**) by contacting an Information Technician at the FCC Reference Information Centers) at 445 12th Street, SW, Washington, DC, Room CY-A257. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician

Three copies of a CD-ROM